UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

STEPHANIE GASCA, et al.,

Plaintiffs, No. 2:17-cv-04149-SRB

v.

ANNE L. PRECYTHE, et al., Jefferson City, Missouri
December 16, 2019

Defendants.

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TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE STEPHEN R. BOUGH
UNITED STATES DISTRICT COURT JUDGE

Proceedings recorded by electronic stenography
Transcript produced by computer

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(Proceedings commenced at 2:38 p.m.)

THE COURT: Good afternoon.

MS. BREIHAN: Good afternoon, your Honor. This is Amy Breihan.

THE COURT: We are here on the case of Gasca versus Anne...

MR. PRITCHETT: Precythe.

THE COURT: ...Precythe, Case Number 17-4149. May I have appearances by the parties, please?

MS. BREIHAN: Your Honor, this is Amy Breihan from the McArthur Justice Center for the plaintiff. My colleague Megan Crane will be here momentarily. She ran to the restroom.

MR. PRITCHETT: Mike Pritchett for the defendants, Judge, here with Matt Kimminau from the Attorney General's Office.

THE COURT: Very good. Mr. Pritchett, I appreciate you always being so respectful. I'm going to ask you not to be respectful today and just stay and talk into the microphone because that will most likely get everybody on the phone.

Did somebody just join us on the phone?

LAW CLERK: This is your law clerk Grace Colato.

THE COURT: Thank you, Grace.

Well, we are here on defendants' motion to dismiss as moot and for failure to join an indispensable party. And so we'll let defense go first and wrap it up by the plaintiff. I

have read all the pleadings that have been filed in this case, read several of the exhibits that have been provided. I'm not going to lie to you and tell you that I've read every case that has been cited, but I've got several of the cases that I've read and looked over and tried to make hide nor hair of Missouri Statute 600.042 and the changes that were made in that piece of legislation. So that's where I'm at. I'll have some questions.

We obviously are letting the plaintiffs appear by phone due to the inclement weather in St. Louis. As soon as this hearing is done, we're going to drive down to Springfield, so I told you I'd give you an hour for the hearing and I'm still giving you an hour for the hearing, but anything after that is going to affect my drive time, so...

MR. PRITCHETT: I'll do my best, Judge.

THE COURT: All right. You all, pull that microphone closer to you. That one, or you're welcome to come stand up at the podium if that's easier for you.

MR. PRITCHETT: I'm not sure which is easier, Judge. I'll start out standing.

THE COURT: Okay.

MR. PRITCHETT: May it please the Court?

THE COURT: Please proceed.

MR. PRITCHETT: The defendants would move to dismiss on the grounds of mootness and failure to join an indispensable

party. I'll begin with mootness.

There has been a general timeliness challenge to the motion to dismiss. It doesn't appear to me that the plaintiffs argue that the portion regarding mootness is untimely, but even if they did, they cannot. Cases have been dismissed as moot even on appeal.

Turning to the merits, then, defendants, the Parole Board and the Director of the Missouri Department of Corrections, their voluntary adoption and implementation of policies compliant with due process has rendered plaintiffs' claims moot, in that they are now no longer subject to the policies that this Court found to be inconsistent with due process in its summary judgment order. As you've noted, the new policies have been provided as exhibits to the motion to dismiss and the reply.

Plaintiffs assert that the case is not moot because the policy changes here are insufficient to show that the allegedly wrongful behavior cannot be reasonably expected to recur in the future. In order for behavior to be reasonably expected to recur, there must be some recognizable danger of recurrent violation, something more than the mere possibility, which serves to keep the case alive.

Plaintiffs have cited a couple of cases as part of their argument that this case isn't moot because the issues are likely to recur. One of those is *Lankford versus Sherman*, but

in that case the action asserted as mooting the case was the mere submission of a new process for approval. Here, the Department of Corrections has actually implemented and is using the new parole policies.

Plaintiffs also cite *Strutton versus Meade*. In that case, the Court looked to see whether or not the changes that were made by the defendant could be maintained if previous budgetary and staffing restrictions might occur -- recur. But defendants here haven't merely submitted something for approval and they haven't submitted something that's going to require additional resources to implement; they've actually implemented the process and they have implemented it with the resources that they have at hand. So it is not likely that the complaints are likely to recur. These policies are in place.

Plaintiffs also assert that the policies themselves don't correct the due process violations that have been found. They allege certain specific process, parole system violations, one of which is they allege parole violators are not provided adequate notice of the alleged violations. But under the new policies, the alleged parole violators are to be advised of the specific parole violations they are charged with at their violation interviews. That's in Exhibit B. They're also provided with a copy of the violation report that sets out their alleged violations. They get these at their violation interviews. That's Exhibit H.

This violation report that they receive describes the particulars of the charged violations, and those particulars include the date, the time, the place, and the basis of any new arrest and identification of outside sources of information. The circumstances of each violation are to be included in separate paragraphs under this new policy. So these policies establish that the alleged parole violators received notice of the parole violations they are alleged to have committed; and, also, by giving the details, the particulars of the violation, they receive the evidence supporting the violation and they receive these before the preliminary hearing.

There's also an assertion in the complaint that the alleged parole violators are not advised of their rights during the revocation proceedings. There is now a specific notice of rights form that's included in the packet. That's Exhibit C. All alleged parole violators are provided a copy of the notice of rights at their violation interview.

In a few places the plaintiff has asserted the notice of rights form doesn't comply with all due process requirements. One of the things they assert is the notice of rights form does not inform class members of their right to appeal. While that is true that's not in the notice of rights form, the notice of right to appeal is information that's provided at the time of the decision regarding whether parole

will be revoked or not.

Plaintiffs also say the notice of rights form does not indicate that the class members will receive a written statement from the fact finders as to the evidence relied on and the reasons for the decision made by the Parole Board, but the notice of rights form specifically provides that -- tells violators that they will get a written statement of the decision, including the evidence relied on and the reasons for revoking parole. That's in the notice of rights form, Exhibit C, Section 3.

The complaint also alleges parole violators are not appropriately screened to determine if they qualify for a public defender appointment. Whether due process requires the appointment of counsel or not is to be decided on a case-by-case basis, though. The appointment, according to the *Gagnon* case, will probably be both undesirable and Constitutionally unnecessary in most revocation hearings. But *Gagnon* does provide that counsel should be appointed in a couple of circumstances. That's when the plaintiff requests counsel based on a claim that he or she has not committed the alleged violation of parole, or where there may be substantial reasons which justified or mitigated the violation that make revocation inappropriate and that these reasons are complex or otherwise difficult to develop or present.

But under Missouri's new policies, when counsel is

requested, the parole officer will use a counsel eligibility screening instrument to determine whether they are eligible for appointment of counsel. That's Exhibit D. This screening instrument asks a number of questions that the parole officer goes over with the parolee. It asks the alleged parole violators about their education and about other potential reasons that could affect their ability to speak for themselves. The screening form also asks whether they are -- the alleged parole violator is contesting the alleged parole violation, and it allows the parole violators to discuss any mitigating circumstances or other grounds making revocation inappropriate.

Based on the information the parole officer gathers from this form, the parole officer then makes a decision about whether the issues to be adjudicated at the revocation process are complex or whether the mitigating -- there are mitigating circumstances that are substantial and whether the alleged parole violator is incompetent to proceed on his or her own. Fielding those questions are just -- the parole officer has the alleged parole violator complete a public defender application. The parole officer assists the alleged parole violator in filling that out, and then the parole officer faxes the application for appointment of counsel to the Public Defender's Office.

We'll get to the actual appointment of counsel in a

moment, but these provisions I've just talked about provide alleged parole violators with appropriate screening under *Gagnon* to determine whether they qualify for appointment of a public defender.

THE COURT: And are those all just based on *Gagnon*? I mean, because you do have some individual decision making by a parole officer about whether someone gets a counsel. Is it your view that those -- that decision making by the parole officer is based on *Gagnon*?

MR. PRITCHETT: Yes, Judge. The form -- the screening instrument, as they call it, was developed based on a reading of *Gagnon*.

THE COURT: Okay.

MR. PRITCHETT: Plaintiffs have also asserted due process violations, in that waivers of preliminary and revocation hearings by alleged parole violators are not knowing and voluntary, but under the new policies -- excuse me -- in determining whether a waiver is knowing and voluntary, no particular requirements have to be met. It's the totality of circumstances that are looked at with particular attention paid to the defendants', or in this case the alleged parole violators', understanding of the right to be waived and how it might be waived.

So during the parole violation interview under the new policies, the parole officer is required to explain the

notice of rights and gives the notice of rights form to the alleged parole violator. This notice of rights explains the parole revocation process and it sets out the rights of alleged parole violators during that process. The parole officer is also to read to the alleged parole violators from the request for waiver of preliminary hearing form and also the request for -- excuse me -- request or waiver of the final revocation form. Those two forms where the alleged parole violator can either state he or she wants the hearing or waives the hearing reminds the parole violators of their right to the hearings, both of them, and to their right to counsel at both the preliminary and final stages, including their right to appointment of counsel if they're eligible for counsel.

So in the totality of these circumstances where the rights are explained from the form, there's actually a discussion with the parole officer and the notice that the hearing is available and that counsel can be provided -- and, actually, in all cases the alleged parole violator can bring counsel at his own choice. Where those things are explained, parole violators who choose to waive either or both the preliminary and the final hearing have done so knowingly and voluntarily. They have the information they need to make those decisions.

Another allegation from the complaint is that alleged parole violators are not provided the opportunity to

present written evidence and witnesses and to confront adverse witnesses. New policies, though, ensure that alleged parole violators may present documents and other evidence at both the preliminary and the final revocation hearings, and they're also guaranteed under these rules the opportunity to confront and cross-examine adverse witnesses at both stages of that revocation process, except in extreme cases in which the hearing officer determines the adverse witness would be susceptible to risk or harm or potential problems where future prosecutions would result. That exception is an item that *Gagnon* recognizes is a part of the analysis on whether confrontation is to occur.

The new policies also provide that alleged parole violators may present their own testimony at both the preliminary and the final revocation hearings, and they're again given a notice of all these rights, Exhibit C. These policies do ensure the right to present evidence, to present themselves, and to cross-examination of adverse witnesses.

In the reply -- excuse me -- in the response, the suggestions in opposition to the motion to dismiss, plaintiffs also assert issues with the length of time between taking a parolee into custody and the revocation hearing. A policy attached to the reply of the defendants shows that revocation hearings are to be held within 30 days from the parolee's return to the Department of Corrections at one of its reception

and diagnostic centers. This 30-day -- it's 30 business days. This 30 business-day time period or even potentially somewhat longer is not an unreasonable time to wait for the final hearing.

Even if these policies do correct the due process issues found by this Court in its summary judgment order, the plaintiffs allege that there have been failures to follow these regulations. I think the comment is they've had -- I don't know if the word countless was used but -- many complaints that these alleged parole violators are not getting the protections these regulations -- policies, rather, provide.

The plaintiffs' challenge here is to the Missouri's parole system. It's not a challenge to any alleged deviations from that system in individual cases. That this is a facial challenge to the system itself, to Missouri's policies on parole, is evidenced from this Court's order granting class certification. That order states defendants' parole revocation policies and procedures apply generally to the class so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. So even if there are any deviations from the newly established process in individual cases, that would still require individual relief and not class relief, as this case is set up to do. And I should mention, when I talk about the new procedures, it's not a wholly new procedure anyway. It was built on a previous one

which even though this Court found some violations to due process was in part still correct.

Anyway, because this is a facial challenge, plaintiffs' allegations that some class members continue to complain of failures to follow the new policies, those complaints aren't relevant. To the extent they have individual issues regarding compliance with the new policies, these claims should be resolved separately in another action because it would be based on individual transactions and not the policy or the system as a whole.

I'll turn now to the other issue, failure to join an indispensable party.

THE COURT: Let me ask you a question since we're getting there, because it seems like that's, at least in my mind, where a lot more of the meat of this is. So you've been quoting *Gagnon*, and I think you started out part of it with this quote, whether there's a due process violation determines on a case-by-case basis at the exercise of the sound discretion of the State authority charged with the responsibility for administering the parole system, and that's *Gagnon* at 790?

MR. PRITCHETT: Yes.

THE COURT: I think you started out with that quote. So the -- clearly, the organization charged with administering the parole system are defendants in this case.

MR. PRITCHETT: Yes.

THE COURT: And so then, as I understand the plaintiffs' argument, then, because you're in charge of administering the parole system and because of the change in the statute, that means your clients then have to hire lawyers to defend them. What's wrong with that argument?

MR. PRITCHETT: Primarily, the defendants don't have the authority to hire lawyers, your Honor. That responsibility is the Public Defender's responsibility. The Department of Corrections doesn't have the resources to hire counsel for alleged parole violators. And even if somehow it did, that would bring up conflict issues, too, in the sense that now you would have someone representing the alleged parole violators against the administrative body that's determining whether or not they violated the parole.

THE COURT: Because the -- I understand your argument under the statute is that it creates and empowers the Public Defender. One of the subsections says, anywhere the Courts say that there's a Constitutional violation, Missouri Public Defenders, that's who you represent?

MR. PRITCHETT: Right. And that's why the argument that the change in the statute ended, terminated, the Commission's responsibility for parole violators is incorrect. That statute did change. It did reduce the obligation of the Public Defender's Office, but it reduced it in the parole situation to certain circumstances rather than all

circumstances, and those certain circumstances aren't relevant here. And it did delete the reference to Commission will represent those detained or charged with parole violations. That is, as I suggest and you mentioned, included in the provision that was in the original statute before 2013 and still after 2013. It says the Public Defender Commission is to provide counsel for those who are required to have it by the U.S. or the Missouri Constitution. That's exactly what the plaintiffs are arguing here, that they're entitled to counsel by the United States Constitution. That provision is still in Section 600.042.45, I think.

THE COURT: You nailed it.

MR. PRITCHETT: Is still there and still puts the obligation on the Public Defender Commission.

THE COURT: Do you know why parole was taken out of the statute?

MR. PRITCHETT: I don't know why. I looked at the bill. It looks like the intent of the bill truly was to reduce the burden on the Public Defender's Office. And, again, previously, it essentially said Public Defender's Office will represent all parole and public -- parole and probation, those who allegedly violated their parole or probation.

THE COURT: And I don't mean to, like, make up facts and thrust them in here, but from my understanding of the plaintiffs' brief, it is that when the screening form was

completed by parole and it's sent over to the Public Defenders, they get nice little emails back saying, we don't have to represent these folks; or they get more lengthy letters like the April 2, 2019, letter by Michael Barrett saying, no thanks, and the emails like the one from April 5th, 2019, from Gina, G-I-N-A, Savoie, S-A-V-O-I-E, to Tracy Declue, D-E-C-L-U-E, saying, we're not going to be representing these individuals.

MR. PRITCHETT: And those exhibits were provided with the motion to dismiss that we filed, and that's exactly why the Commission needs to be a party in this case, the Public Defender Commission, because if they were fulfilling the responsibility of appointing lawyers when the *Gagnon* factors applied, the order could be to the defendants in this case, the Parole Board, make sure lawyers are provided and they could do the screening, which they're doing, fax the request over to the Public Defender's Office, and then the Public Defender could fulfill its responsibility. But that's not what's happening. They need to be in this case so that -- I guess I won't say if this is a requirement because *Gagnon* says it is -- so that the party that is obligated under State law to provide those counsel in those cases is part of this case and injunctive relief can actually provide the relief that the plaintiffs are asking for.

THE COURT: Because you say one of the reasons that the Department of Corrections and the Parole Board can't be

ordered to hire lawyers is because they don't have the resources. We all know for sure -- I think it would be fair to say we all could agree that the Public Defender is going to say, we don't have the resources. So to some extent we'll just be in the same spot even if they were a party.

MR. PRITCHETT: Well, in addition to the resources -- and I understand the Public Defender Commission has taken a point of view that it is overburdened and can't take on this responsibility, but the defendants in this case, again, don't have the authority to appoint counsel, so the order would basically be impossible to comply with. And in, I think it was *Randolph versus Rodgers*, an injunction shouldn't be issued when it would be impossible to fulfill.

And, theoretically, the Department of Corrections, if ordered, could try to go out and provide counsel. If that were the case, other plaintiffs out there could say, that's beyond your responsibility, Department of Corrections. You're using my taxpayer money for something you shouldn't be doing, so stop it. That gets into assuming it was not feasible to join the Commission, and again, we assert that it is feasible to join. It would actually be the Commissioners and maybe individual officials of the Public Defender Commission because you can't sue the Commission as a body, of course, but just as the Director of the Department of Corrections and the Parole Board members were sued, so could the Commission members, so

could -- I think the chief administrative officer is called the Executive Director.

THE COURT: The *Gagnon* case is obviously 1973. A lot of cases interpreting it since then. And I come back to that language that says the decision for the need of counsel must be made on a case-by-case basis at the exercise of the sound discretion of the State authority charged with the responsibility for administering the probation and the parole system. And so what I hear you saying is, Judge, we're doing that, we're filling out our screening form the best we can under the -- how we interpret it, and then we send it to the Public Defenders and they say, we're not going to defend them, so, Judge, our hands are tied here.

Are you aware of any case in the prodigy of *Gagnon* that has said, well, since the Parole Office has the discretion to determine if they need counsel, then the Parole Office has to hire the lawyer?

MR. PRITCHETT: I'm not aware of any such case, Judge.

THE COURT: I would imagine plaintiff would be the one telling us if they were aware of that case.

MR. PRITCHETT: And I can't suggest what they may cite today. I haven't seen it cited in pleadings or motions up to this time.

Just to briefly take a step back to address the

timeliness challenge which is made to the Rule 19 part of this motion, case law cited in our brief, *Mescalero Apache Tribe* and *United Government of Wyandotte* -- excuse me -- *Wyandotte Nation*, both say that the indispensable party issue may be raised at anytime. In fact, the diagnostic unit case says the issue of whether a party is indispensable is not waivable and a Court has the duty to raise the issue sua sponte. Cases cited by the plaintiffs in their suggestions in opposition, *Provident* and *Judwin*, both deal with cases where it was raised on appeal, in fact, one case even after oral argument was made. And then the *Oklahoma versus Tyson Food* cases --

THE COURT: I can tell you the timeliness thing is just not an issue for me at least. And you're welcome to talk about it, so is plaintiff, but I mean, this case is not what I would call your traditional path. This is not a traditional case. It's not -- traditionally, the defendants don't agree to summary judgment or agree to class action. All this is -- you know, I didn't do the Supreme Court case. The summary judgment I entered, but it's because nobody opposed it. Class action I entered because nobody opposed it. So this -- the timeliness just doesn't strike me as the best argument here.

MR. PRITCHETT: I will pass on, then, and leave it to what's said in the briefs, because as you can probably tell, I don't know that I'm getting in anything beyond the briefs anyway. I'm happy to answer any questions.

THE COURT: Well, let's see what plaintiffs says, and then I'll give you an opportunity, if you'd like, to rebut.

MR. PRITCHETT: I will do that, Judge. Thank you.

THE COURT: Thank you. Plaintiff?

MS. BREIHAN: Your Honor, this is Amy Breihan. I first want to thank you for allowing us to appear by phone so we didn't have to make that treacherous drive. I appreciate the flexibility.

THE COURT: Safety first.

MS. BREIHAN: I want to -- of course, I'll address the defendants' arguments with respect to both mootness and the necessary and indispensable party, but I want to first take a step back and ask the Court to consider what it would mean to dismiss the case at this point, because that's what the defendants are asking for, the dismissal of a class action that's already been certified, or a summary judgment that's already been granted in favor of the plaintiffs' class and where the Court has already found that the defendants, without dispute, were systematically violating class members' due process rights in six big ways: By failing to provide adequate notice of alleged parole violations and the basis of revocation decisions; by routinely failing to advise class members of their rights during revocation proceedings; by securing waivers of preliminary hearings and final revocation hearings that are not knowing, voluntary and intelligent; by not screening for or

providing State-funded counsel in compliance with *Gagnon*; by refusing to disclose to a parolee evidence against them and denying them the opportunity to present witnesses or confront adverse witnesses at the preliminary or revocation hearings; and by failing to conduct revocation hearings within a reasonable time after the parolee is taken into custody, all in violation of the 14th Amendment.

Now, the defendants make some distinction between a facial attack versus these individual claims or the facial attacks to the actual written policies. This case has always been about, not just the written policies and procedures of the Department of Corrections and its Parole Board, but also the customs of the DOC and its Parole Board. That's clear from Paragraph 1 of the class action complaint, which says that this is a civil rights class action complaint filed on behalf of men and women in custody or under supervision of the Missouri Department of Corrections and who are at risk of imprisonment without adequate due process as the result of unconstitutional practices, procedures and customs of both MDOC and its Division of Probation and Parole.

THE COURT: So from my perspective, if there's -- I mean, maybe they're doing some of them right, maybe they're doing some of them wrong. Tell me the ones that they're doing wrong, because if there's one that they're doing wrong still, well, then it's not moot. And I'm assuming the one you're

going to tell me they're doing wrong is appointment of counsel.

MS. BREIHAN: Yeah, your Honor, I'm happy to answer that question and identify specifically what they're doing wrong, where they have not mooted our claims. I want to just remind the Court that -- and I'm sure you're already aware of this -- it's a very stringent test for proving mootness, and that burden is on the defendants who have moved for dismissal on mootness. It has to be absolutely clear that the allegedly wrongful behavior, and here proven wrongful behavior, could not reasonably be expected to recur. And the Court should not dismiss the case for mootness unless it's impossible -- unless it's impossible for the Court to grant any effectual relief whatsoever. In other words, they have to meet the heavy burden of showing mootness as to every violation that was established by the summary judgment that was granted earlier this year.

Their purported proof of mootness is just these new written policies which are attached to their motion and reply. Their new policies are not enough to moot plaintiffs' claims. For one, they don't address all of the Constitutional deficiencies in the revocation process. So, for example, the Supreme Court is actually very clear that parolees are entitled to disclosure of the evidence against them. That's in *Morrissey versus Brewer*, which pre-dates *Gagnon* by just a year. And that while the new policies require that parolees be advised of the violations they are charged with, they don't

require that parolees be apprised of the evidentiary basis for any alleged parole violation.

Now, the defendants' response is, well, parolees will get a violation report. Well, that's not always the case. And they're not always given that violation report at the time they are making critical decisions, such as whether to waive a preliminary hearing or whether to ask to be screened for counsel. And the undisputed facts that were presented on summary judgment are the field violation reports don't always contain relevant facts or an explanation of the alleged violation. That's in Paragraph 70 of our summary judgment motion. They often contain little more than admission from the parolee. And in some instances, parolees are arrested before they ever give a field violation report. That comes in Paragraph 68 of the summary judgment order.

So this representation by the defendants that, hey, we have this written policy that says they get a field violation report, well, that was there before and they weren't complying with that, so why should we trust the defendants are going to comply with this new policy when they weren't complying with the one before?

The notice of rights form is also an issue. This basically replaced what was previously referred to as the red book which our expert identified a number of issues with, including that it wasn't written in plain language or in a

manner acceptable to the expected reading comprehension level of the average parolee. And you can see our expert report talks about that on Page 4. It doesn't indicate whether or when class members will receive a written statement by the fact-finders as to the evidence relied on and the reasons for revoking parole, but due process requires that.

Now, the defendants argue that this -- in their response that this is not raised in the complaint, the allegation that parolees are not given an explanation as to evidence relied on, the reasons for revoking, but that's not true. It's clearly -- the foundations are clearly a part of the case. In fact, an entire section of the summary judgment motion is titled "Defendants violate the proposed class's due process by failing to provide adequate notice of alleged parole violations and the basis for revocation decision."

So I've talked about notice of the violations and the evidence for it, notice of rights form. A third example -- and these are non-exhaustive, but a third example with the written policies is that the screening tool and the policy that relates to the screening tool focused almost exclusively on competency and are not compliant with *Gagnon*.

THE COURT: What was that last thing you said? You said the screening tools focused on competency and not what?

MS. BREIHAN: Yeah. It focuses almost exclusively on competency and not -- you know, *Gagnon* has a couple of

different factors to consider as to whether somebody would be eligible for State-funded counsel when they're facing revocation. It's not just competency. But the screening tool and the written policies by the defendant seem to focus on that, and that's borne out by some of the individuals we've spoken to who have gone through the process. And I'll get to that in a moment.

But those -- I don't want to just focus on the written policies because they don't address all the unconstitutional practices that were found to be occurring here, right, and so in order to show mootness, you've gotta show there are no live claims. Well, even if they were complying with these policies, even if they brought them into compliance with *Gagnon* and *Morrissey*, which they don't, they don't provide any evidence that they are compliant with the policies or what due process other than otherwise required.

So the waiver issue is the big one, right? On summary judgment, this Court found that class members were being routinely pressured to waive their rights during the revocation process. The defendants provide this written policy that they say, you know, requires that they're going to be provided notice of their rights, which we have issues with, and that would ensure that there's no involuntary waiver anymore. They don't provide any evidence to back up that conclusionary representation. And as I'll discuss in a moment, there is

evidence that will show this is not happening, that folks are still being pressured to waive their hearings and their rights during the revocation process.

Another issue is the issue with timeliness. Although the defendants say that the new policy requires that revocation hearings be conducted within 30 business days of returning to a reception and diagnostic center, their answer to a recent set of interrogatories says that since February of this year, February 27th of 2019, hundreds of parolees have spent more than 60 days incarcerated prior to having their revocation hearing, hundreds.

The defendants insist that these written changes, these written policy changes, are such that deficiencies are not likely to occur. Well, setting aside for a brief moment the fact that due process violations do continue to occur, this argument does not win the day. In fact, as a matter of law, policy changes not reflected in statutory changes or even in changes in ordinances or regulations do not necessarily render a case moot. That's from the *Rosebrock* case, *Rosebrock versus Mathis,* out of the 9th Circuit.

And the 8th Circuit in 2008, in a case involving student civil rights claims against a school district and superintendent and others about school policies, during that case the defendants actually changed their policy, and there even the 8th circuit said, this doesn't render the case moot

because it's a voluntary change of policy. It's not something discriminate, for example, as a change in statute. And here the defendants have amended their policies multiple times, including as recently as September of this year. They can just as easily change them again. Indeed it's for this reason, as I said, this lack of permanence, the Court noted that a policy change does not necessarily render a case moot. That's in the *Rosebrock* case. It's supported by *Lowry, ex rel., Crow versus Watson Chapel School District* out of the 8th Circuit. It's supported by *Akers versus McGinnis* out of the 6th Circuit which said that a revision of the Michigan UMC rules did not moot Constitutional challenges to its previous rules.

THE COURT: Let's say I agree with you and that there's a whole bunch of factual scenarios that I'm going to be hearing about in Kansas City early next year and that because of those factual differences -- and not all before this Court at this time, I need to -- I deny the mootness motion. Tell me more about joining the Public Defender in this case, why that's not necessary.

MS. BREIHAN: I'd be happy to, your Honor. So the argument that the Public Defender is a necessary party here is, quite frankly, a distraction, I think. First of all, we don't deny that the right to and the obligation to screen for and provide counsel is an important part of this case, but I want to be clear, that's not the only part of this case. At the

beginning of my argument, I laid out six categories, broad categories, of due process violations which, your Honor, exist across the parole revocation system in the state of Missouri. One of those six categories is not screening for or providing State-funded counsel in compliance with *Gagnon*. Now, under *Gagnon versus Scarpelli*, the responsibility for screening for and for providing those attorneys falls on the agency that is responsible for administering the parole system, which as you pointed out earlier, is the responsibility of the named defendant.

THE COURT: What's the best case that says exactly that?

MS. BREIHAN: It's *Gagnon*. It's *Gagnon* itself that says exactly that.

THE COURT: *Gagnon* says, we think, rather, that the decision as to the need for counsel must be made on a case-by-case basis at the exercise of the sound discretion of the State authority charged with the responsibility for administering the probation or parole system. What I heard the State say was, well, we're determining the need for counsel on a case-by-case basis, but that doesn't mean we have to provide it. Is that wrong?

MS. BREIHAN: That -- that is wrong. Our argument is that is wrong. It's a mistaken reading of *Gagnon*, that *Gagnon* places the responsibility for ensuring that parolees who

are eligible to have attorneys, that responsibility lies with the agency that's administering the parole system. Here, that is the defendants. And --

THE COURT: Do you know of any state -- is there any state that you know of that the Department of Corrections provides the attorneys to represent people on parole violations?

MS. BREIHAN: So in the state of Illinois, the DOC does provide, through private contract, attorneys for parolees who are eligible under *Gagnon*. Now, I want to make sure that it's clear, you know, the defendants do have authority here to provide attorneys to eligible parolees. That's the big argument the defendants make is, okay, we can screen and determine whether they're eligible, but then we can't do anything beyond that. Well, that's -- first of all, it's unjust, right, to say that we know someone's eligible but we're going to keep them incarcerated and have their hearing anyway or continue their hearings indefinitely because we can't give them attorneys. That's just an unjust outcome, but also it's not true. They have the authority to enter into contracts in order to meet their obligation.

THE COURT: And that's your Section 217.035 that gives them the authority?

MS. BREIHAN: Yeah. 217.035 gives the Director of the Department of Corrections, who's named as a defendant here,

the authority to secure contractual services for the Department in each of its divisions.

And also, Under Section 217.020, the -- it says that the DOC shall advise, consult and cooperate with private entities in developing and implementing programs to fulfill the Department's responsibilities. Well, one of the Department's responsibilities is administering a Constitutionally adequate parole revocation system, which includes properly screening for counsel and providing counsel where somebody is eligible.

An analogy to what's going on here is a provision of medical care within the Department of Corrections, right? The Department of Corrections has a Constitutional obligation to provide medical care to inmates in their custody and control. Now, they could do that themselves, and historically in Missouri they have done that, or they could do what they do now, which is contract out with a third party to provide medical services in order for them to be able to meet their Constitutional obligations. And that's why Corizon, L.L.C., is the healthcare provider who's contracted with the Missouri DOC, pursuant to 217.035.

Similarly here, the DOC and its Board of Probation and Parole have a Constitutional obligation to screen for and provide counsel to parolees who are eligible under *Gagnon*. In order to meet that contractual obligation, they can enter into a -- excuse me -- in order to meet that Constitutional

obligation, they can contract for services with private attorneys under 217.035.

The defendants keep saying they don't have authority or they don't have the power to provide attorneys, but they haven't ever explained why. They haven't, for instance, cited any law that says they do not have that power or authority. They make this argument in response that we seem to suggest that any State agency with the statutory authority to enter into contracts can be sued to enforce any Constitutional rights when their remedial actions required are obtainable by contract. But that's not the truth -- that's not the case here. We're not asking the -- the plaintiffs are not asking the defendants to enter into a contract to remedy a Constitutional harm for which they are not responsible.

There is no dispute that the defendants caused plaintiffs' due process violations and continue to take actions and inactions which result in due process violations for class members across the state. They're directly responsible for these violations, and it is their responsibility to remedy it. Fortunately, they have the authority to do that by entering into the contract under 217.035.

THE COURT: Well, one thing you're saying is, don't dismiss the case on the mootness argument, we want to stick around and see if they really do abide by the new policies even if you don't agree all the policies are there, but you're also

saying, well, we don't want to join the Public Defenders at this time. I mean, if the case is going to be around a little while, why not get the Public Defenders in here so we have an opportunity to fight about who actually is in charge of defending these folks under the *Gagnon* decision?

MS. BREIHAN: Well, the reason not to do that is that you don't have to, right? And so in order to join them in, the defendants have to prove that they are a necessary party, which means they have to show that this Court can't give complete relief to the parties that are already in this suit. So this analysis is independent of the question whether relief might be available to the absent party, that under 19(a) we've got to determine whether they're a necessary, in which case they must be joined if feasible. But the central question in deciding defendants' motion under Rule 19 is, can the Court grant parties complete relief without even bringing the Public Defender into the case? The answer is yes. So the analysis really stops there. There is no need to grant their motion or bring the Public Defender in.

THE COURT: Well, and I can't make you sue them, right?

MS. BREIHAN: In fact, they're already -- you know, are being sued, and to bring them in, it would create a case within a case that's just unnecessary.

THE COURT: When you say they're already being sued,

is that some case pending in front of Judge Laughrey or...

MS. BREIHAN: Yes, the *Church* now *Dalton* case. But I want to make clear that, of course, if your Honor finds that they're necessary, they could be brought in for purposes of remedy only, but they're not necessary. The relief that the plaintiffs have asked for relates only to the defendants' policies, practices and customs. We asked for a declaratory and injunctive order declaring that the policies, practices and customs are unconstitutional and enjoining them would subject the class to unlawful policies, practices and customs. So without a doubt, the Court can grant that relief in the absence of the Public Defender.

That's especially true given that the defendants have statutory authority to provide attorneys. And that seems to really be the only bone of contention. The defendants aren't arguing that they don't have -- that they don't have authority to provide adequate notice or advise class members of their rights or make sure waivers are really voluntary and intelligent, for example. They believe then, at least it seems to me, that they have the power to change that. They're not -- the only point at which they're, you know, sort of throwing up their hands and saying that they can't do anything is with respect to providing the attorneys, a pretty narrow issue, and they actually do have the authority to do that.

THE COURT: You said they could be enjoined for the

remedy portion only; is that right?

MS. BREIHAN: Yes, your Honor. So we -- as an alternative argument, we said -- in the first instance, they're not necessary. If the Court finds that they are necessary, they could be joined solely for remedy, and, you know, that could be done -- I guess even without joinder, they could be heard by the Court in an amicus brief or something of the like, but we certainly don't need to dismiss the case because they're not indispensable.

And I think even the defendants -- and Mike can correct me if I'm wrong -- but I think in their reply brief at Page 9 the defendants concede that joining MSPD is feasible, and so the Court needs to determine whether they're indispensable. The question is really whether they are necessary or not.

THE COURT: Anything else from plaintiff?

MS. BREIHAN: I do want to highlight a couple more things, your Honor. One is that, as you pointed out, I think you've already considered and perhaps decided this issue when you considered the defendants' first motion to dismiss filed earlier on in the case where you actually noted that you could craft complete relief for the plaintiff even if the defendants don't have authority to provide counsel. And you certainly weren't conceding that they didn't have the authority, but you acknowledged that with these parties as named, you could afford

complete relief, which leads to the conclusion that the Public Defender itself is not a necessary party here.

I was going to highlight a couple of specific issues that persist to sort of highlight the evidence that we will be presenting in February. I'm happy to still do that if you'd like to hear it. I want to make sure it's clear we're not waiving our timeliness argument, but we'll stand on our brief as to timeliness because I understand that you indicated that it wasn't really an issue for you, and so I don't want to waste the Court's time on that.

THE COURT: Yeah. I don't think the timeliness is that -- I don't think you need to give me a preview for February. I predict it's going to be cold between now and February. That's my preview.

MS. BREIHAN: The only thing I'll say as to timeliness is that timeliness is definitely relevant. Even if it's not dispositive, it's relevant here in terms of, you know, how recently the defendants made some of these policy changes. And that goes to the issue of mootness. So in an 11th Circuit case, *Bruce Rich versus Secretary of Florida DOC*, the Court said that -- the Court considered the timeliness of the change in policy in determining mootness, and they noted that this was made not before litigation was threatened but late in the game. It was citing another 11th Circuit case which also found a claim wasn't mooted by a school district's voluntary cessation

of the activity in part because a change was only made when there was imminent threat of a lawsuit. Well, you can't get much later in the game than here where most, if not all, of the policy changes that are relevant here and raised in defendants' motion were made after summary judgment was granted and some as recently as September, which was many months after summary judgment was granted. So, again, that goes to the question of whether these policy changes were truly -- really moot the claims at all, even if they addressed questions that the Court found in Griffin when it granted summary judgment.

THE COURT: Let me ask you a variation on the same question that I asked the Parole Office counsel. They said that they don't have the resources to hire lawyers and that the proper state entity that hires lawyers in this kind of -- is the Public Defender's Office. I mean, nobody's saying that there's not a due process right under *Gagnon* to have a lawyer under certain situations, but I hear the Parole Office saying -- Parole Office Commissioner saying that, listen, that's not us. I mean, ultimately, what I've heard is they don't have the money. We know we're going to hear out of the Public Defender's Office that they don't have the money. I mean, somebody's got to fund this, and I want to make sure we have all the proper parties if I've gotta say, somebody's not following *Gagnon* and you're the right party to provide those services and fund those services. Tell me about that from the

plaintiffs' perspective.

MS. BREIHAN: Well, your Honor, the defendants haven't cited to any law that says that the Public Defender is the only entity that can provide representation to indigent defendants or to indigent alleged parole violators who qualify under *Gagnon*. So certainly they have the authority to provide representation in certain instances, but they don't -- they haven't cited to any law that says that only the Public Defender can. In fact, there are indigent defendants who get proper representation elsewhere or proceed pro se.

Also, this argument that DOC doesn't have the resources seems to be presented here for the very first time. I don't think that there's any evidence in the record that the DOC does not have the resources. In fact, the only evidence on resources is to the contrary and compares the resources that the DOC enjoys as compared to the Public Defender system, which is notoriously overworked and underresourced and has been for many years.

THE COURT: Well, we don't have that evidence in front of us either. I mean, the reality is DOC has more funding, but they have more responsibilities. I mean, and they do have this statute that says -- 600.042, that the Public Defender is responsible for the representation of anybody where there's a Federal Constitution or a State Constitution which requires the appointment of counsel. So they do have some

authority that they point to.

MS. BREIHAN: Yes. So two things, your Honor. First is that the resources of the -- for the Public Defender is important. We included it in our response on Page 12. But, secondly, the statute that sets forth the responsibility directed to the Missouri State Public Defender Commission, as Mr. Pritchett noted in his argument, was changed significantly and removed the language that gave the correct obligation to provide attorneys to individuals facing revocation. He indicated that that was done in order to reduce the burden on the Missouri Public Defender, and so as a matter of law, we have an obligation to interpret that statute in order to give intent to what the General Assembly intended when it eliminated that language.

And the exhibits that are attached to the defendants' motion that are in correspondence between the DOC and the Public Defender's Office make clear that their position is the same as ours, which is that when this statute was amended, it eliminated the obligation to provide attorneys to parolees facing revocation who are eligible under *Gagnon*.

Now, there are a couple of cases that the defendants cite in support of this argument. One is the *Patterson versus Pennsylvania Board of Probation and Parole* case where a parolee had their parole revoked, they brought a habeas action, and the trial Court said you get a new hearing and, Parole Board, you

have to give an attorney to this person. And there it was reversed, and the Court said the Office of Public Defender, not the Parole Board, should have provided counsel at the revocation hearing.

But that case is distinguishable in two very important -- really three very important ways. First is that at the time of that case, which was in 1969, *Gagnon* had not been decided. And there was a State statute in Pennsylvania which gave -- said that the Public Defender shall be responsible for furnishing legal counsel to any person who, for lack of sufficient funds, is unable to obtain legal counsel at probation or parole proceedings and revocation thereof. So that's almost the exact language that was deleted from the Missouri statute at issue here regarding the obligations of the State Public Defender Commission. And, in fact, that State law was broader than the right to counsel in *Gagnon*.

So the -- the statements or authority can be found for vesting in the Parole Board the duties and responsibilities of appointments of counsel for indigents. The Court pre-dates *Gagnon* placing that responsibility on the defendants here, the agencies responsible for administering the parole process.

THE COURT: All right. I've got everything that I need to ask. Anything else from the plaintiff?

MS. BREIHAN: One final note, your Honor. To the extent that the Court reaches the question of indispensability,

it seems like you're not going to, but I would just want to make sure it's clear for the record that there's no prejudice to entering a judgment in the PD's absence and that if there were any prejudice, that could easily be avoided by shaping the relief here that, as I said before when talking about whether PD is a necessary party, that the Court can afford complete relief to the party without bringing them in, but if the Court does feel that they're necessary, then we would ask that they be joined here for purposes of this hearing, that the case not be dismissed.

THE COURT: Okay. Any brief rebuttal from -- I keep wanting to call it the State, but that's -- how about we'll call it the defendant?

MR. PRITCHETT: Well, in this case it's not the State because that is one of the arguments that was just made, that it's the State's obligation to provide counsel. Well, under *Gagnon*, it's the State's responsibility, but it's not the part of the State that's been sued. It's the Public Defender Commission's duty to do that.

And I couldn't disagree more with the interpretation of the statute that the removal of the specific reference to representation of parole violators was taken out of the statute means they don't do it anymore, because it very directly says, in those cases where the Federal Constitution requires representation, the Public Defender shall do it, and that's

exactly what the claim is here. In terms of, oh, the State -- excuse me -- in this case, the Department of Corrections could just have a contract and the analogy is with the medical provision, medical care, that's a false analogy. There's no alternate body set up by the State statutes to provide medical care as there is with the State providing legal representation to those who are due representation and can't afford it.

Another distinction, I think, is, it's been a longstanding requirement of correctional prisons that they need to provide medical care. So, I mean, that's, like, a core function. I would say providing legal representation is not a core function of the Department of Corrections. And, again, especially in this case where a separate body has been created to deal with that.

You asked whether you had the authority to require the Public Defender Commissioners to be joined --

THE COURT: I don't think I do. I mean, I think either plaintiff has to ask to join a party or...

MR. PRITCHETT: I'm not asking --

THE COURT: You're saying because they are an indispensable party, then they need to be dismissed. You're not asking to join them. I get that.

MR. PRITCHETT: I'm not asking that, and I think that's the reason to dismiss this case because the Public Defender Commissioners could be added; they just have chosen

not to.

THE COURT: Sure.

MR. PRITCHETT: But when it gets to it, Rule 19(a)(2), joinder by Court order, if a person has not been joined as required, the Court must order that person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

THE COURT: 19...

MR. PRITCHETT: 19(a)(2).

MS. BREIHAN: Your Honor, may I address that briefly? I don't want to interrupt Mr. Pritchett, but...

THE COURT: Yeah, let's let him finish up, and I'll join you back in there.

I'm always learning of all these magical Article III powers, just forcing people to be parties to lawsuits. I mean, 19(a)(2).

MR. PRITCHETT: And, I don't know, Amy may be saying there's some interpretation of that statute or that rule that's not apparent to me, but it appears to me that it gives you the authority to do that.

THE COURT: What do you think there, Amy?

MS. BREIHAN: Yeah, so the analysis under Rule 19 is such that if the Court finds that the Public Defender Commission is a necessary party, then they must be joined,

period. And so the Court has the authority to do that if you make the determination that they're necessary, in other words, if you find that you can't give complete relief to the parties without bringing them in.

I haven't heard any argument from the defendants as to why, if the Public Defender is necessary, they cannot be joined, and they would have to prove that in order to even reach 19(b) analysis of whether they're an indispensable party, in which case even in good conscious and justice of the case, must -- in equity and good conscious, the case must be dismissed. So the first question is, are they necessary, in which case they must be joined. And then if they can't be joined, then you get to 19(b). But I haven't heard any argument as to why the Public Defender can't be joined.

MR. PRITCHETT: I don't have an argument as to why the Public Defender Commissioners can't be joined. I'm surprised they haven't been. I think they need to be and, in their absence, complete relief cannot be provided to the plaintiffs.

My reading of this thing -- and, I mean, I'm sure there are distinctions, but it seems to be the main argument is that they're not getting lawyers. And even if this Court could fashion a remedy that just said, if you don't get a lawyer, well, then don't put them through the process, which since I doubt the Court would say hold them indefinitely, I think the

result would be they get out if they don't get a lawyer. If that were the case, I think that that --

THE COURT: It doesn't seem like the best public policy.

MR. PRITCHETT: It would seem like an improper remedy to do that. And it would be much more --

MS. BREIHAN: Well --

MR. PRITCHETT: -- friendly to have the Public Defender's Office here. And I see we have a disagreement over whether the Public Defender's the exclusive party to provide that, but again, I look at the statute, and the statute to me says if it's required, Public Defender, you do it.

THE COURT: Amy?

MS. BREIHAN: Yes, your Honor. Well, going off of what Mr. Pritchett just said about as an alternative to ordering the defendants to provide attorneys to eligible parolees saying, well, if someone is eligible under *Gagnon* and you don't give them an attorney, then you have to release them, that is totally within the realm of reasonable and permissible relief here. In fact, under the *Brown versus Plata* case out of California, the issue there was prison overcrowding, and instead of saying that these prisons have to somehow make more room for these folks, they said, if you don't have room for them, you have to start releasing people. So that's totally within the realm of permissible relief.

But I want to just make sure that we are not focusing exclusively on the right to counsel because, again, that is one part, an important, however one part of this case. There is so much more to this case, you know, so many more Constitutional violations that have been established without dispute back in February that continue to persist, and so this right to counsel aspect is just one part of it.

We don't need to bring the Public Defender in because, thankfully, the defendants have the authority to contract for attorneys in this instance, and even if it would require them to spend a little bit of money, as was pointed out in *Randolph versus Rodgers*, you can order a State and its officers to comply with Constitutional obligations even where injunctive relief would have a substantial ancillary effect on the State Treasury. Defendants don't concede that point of law. I just want to reiterate that that's about more than right to counsel and that you, your Honor, have authority and ability to enter adequate relief here without bringing in another party and making this a case within a case about the Public Defender system within the State of Missouri and their lack of resources and authority.

THE COURT: Mike, one more bite?

MR. PRITCHETT: I think it would just be rehashing what we've discussed, Judge.

THE COURT: All right. Well, we're taking off

towards Springfield. Thank you so much for these oral arguments. Everybody keep planning on -- is it February we're seeing everybody? Or is it January?

MS. BREIHAN: Yes, your Honor.

MR. PRITCHETT: February 7th, 6th.

THE COURT: February 6th and 7th in Kansas City. All right. We'll see you there.

MS. BREIHAN: Thank you again for accommodating us to appear by phone. We appreciate it.

MR. PRITCHETT: Thank you, Judge.

(Proceedings concluded at 3:47 p.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

January 31, 2020

/s/Judy K. Moore
JUDY K. MOORE, CRR, RPR
United States Court Reporter